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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 RANDAL KENNETH GIBSON,

7 Movant,

8 -vs-

9 UNITED STATES OF AMERICA,

10 Respondent.
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No. 2:03-CR-2083-WFN-1

ORDER DENYING § 2255 MOTION

12 Before the Court is Movant's 28 U.S.C. § 2255 Motion to Vacate, Set Aside or
13 Correct Sentence. (ECF No. 165). The Ninth Circuit authorized filing of a second or
14 successive 28 U.S.C. § 2255 pursuant to *Johnson v. United States*, 135 S.Ct. 2551 (2015).
15 Several months following authorization, the Supreme Court determined that the vagueness
16 concerns rendering the ACCA unconstitutional do not apply to application of advisory
17 guideline sentences. *Beckles v. United States*, 137 S.Ct. 886 (2017).

18 **DISCUSSION**

19 To gain relief, Mr. Gibson must establish that (1) he is in custody under a sentence
20 of this federal court; (2) his request for relief was timely; and (3) the court lacked either
21 personal or subject matter jurisdiction, the conviction or sentence is unconstitutional, the
22 conviction or sentence violates federal law, or the sentence or judgment is otherwise open
23 to collateral attack. 28 U.S.C. § 2255. Despite having not been sentenced pursuant to the
24 ACCA, Mr. Gibson asserts that his sentence is unconstitutional according to *Johnson*. Mr.
25 Gibson argues that mandatory guidelines have the same effect as law, and therefore the
26 conclusion of *Beckles* does not apply. Unfortunately for Mr. Gibson's argument, he was
27 sentenced *post-Booker* and therefore not subject to mandatory guideline application.
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1 Mr. Gibson attempts to resuscitate the claim by arguing that because the Court
2 originally erred by treating the guideline range as presumptively reasonable, Mr. Gibson's
3 claims should be treated as if the Court sentenced pursuant to a mandatory guideline.
4 Presumptively reasonable does not equate to mandatory. The Court specifically
5 recognized, "I want to point out what all of us know, is that the guideline are now
6 advisory." Sentencing Transcript, ECF No. 118, pg. 4, lns. 23 -24. Though the Court
7 clearly viewed the range as presumptively reasonable, the Court also took all factors into
8 consideration when imposing a sentence, including the § 3553(a) factors as well as the
9 specific issues raised in Mr. Gibson's motions for downward departure. The Court noted
10 that the guideline range was the same regardless of whether the Court relied on drug
11 quantity guidelines or career offender guidelines due to the large amount of drugs involved
12 and Mr. Gibson's lengthy and serious criminal history. Had career offender not been an
13 issue, Mr. Gibson would have still had the same guideline range, the same consideration of
14 §3553(a) factors, and the same balance of equities. The only difference would be that he
15 could have pursued an adjustment following the revision of the drug quantity table. Had
16 Mr. Gibson been eligible to pursue an adjustment after the guideline changes for drug
17 offenses, his ultimate sentence represented what would have been the high end of the
18 range.

19 Consequently, even if the Court concurred with Mr. Gibson's position, which it does
20 not, the practical effect would be very limited. Mr. Gibson has already served his time.
21 He is now on supervised release. Though he argues that the Court could shorten or
22 eliminate supervised release if the Court determined that he had overserved, the Court
23 would be bound to view the same factors as the Court examined during the original
24 sentencing hearing including Mr. Gibson's substance abuse issues and lengthy criminal
25 history. This Court does not impose supervised release as a punishment, but rather as a
26 tool to help people such as Mr. Gibson access resources and support not otherwise
27 available to them to move towards living a crime free life. Supervised release also adds
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1 the benefit of protecting the public by adding an incentive for supervisees to stay sober and
2 to avoid recidivism.

3 **CERTIFICATE OF APPEALABILITY**

4 An appeal of this Order may not be taken unless this Court or a circuit justice issues
5 a certificate of appealability finding that "the applicant has made a substantial showing of
6 the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (West 2013). This requires a
7 showing that "reasonable jurists would find the district Court's assessment of the
8 constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
9 Based on the Court's preceding analysis, the Court concludes that jurists of reason may
10 differ with the Court's conclusion. Thus a certificate of appealability should issue.

11 The Court has reviewed the file and Movant's Motion and is fully informed.
12 Accordingly,

13 **IT IS ORDERED** that Mr. Gibson's Motion to Vacate, Set Aside or Correct
14 Sentence by a Person in Federal Custody Pursuant to 28 U.S.C. § 2255, filed April 29,
15 2017, **ECF No. 165**, is **DENIED**.

16 The District Court Executive is directed to:

- 17 • File this Order,
18 • Provide copies to counsel and *pro se* Movant, **AND**
19 • Inform the Ninth Circuit Court of Appeals that if the Movant files a Notice of
20 Appeal that a certificate of appealability is **GRANTED**.

21 **DATED** this 23rd day of May, 2017.

22
23 s/ Wm. Fremming Nielsen

24 WM. FREMMING NIELSEN
25 SENIOR UNITED STATES DISTRICT JUDGE
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05-16-17